Jenkin-Boys Co., 49 Wash. 369; *Bank of Glencoe* v. *Cain*, 89 Minn. 473, 95 N. W. 308; *Bank* v. *Closson*, 29 Oh. St. 78.

The very fact that so many courts have held defenses to be consistent, when in fact they probably were not, is a very persuasive argument in favor of the conclusion reached by the principal case. The Supreme Court of Minnesota there held that the general rule (as to inconsistent defenses) should and would not be applied "so as to prevent a meritorious defense or work manifest injustice." The end sought was a speedy trial on the merits, not an artistic and symmetrical system of pleading. Their attitude is well expressed thus: "Naturally enough the legal mind revolts at a rule of pleading which requires a defendant to choose which of two defenses he will interpose, though both cannot be true, and neither is within his knowledge, at the peril of losing all if he mistakes, for when called upon to elect he is having his final day in court." It is inconsistent with the spirit of the modern procedure to refuse to allow a defendant to plead inconsistent defenses, when there is a real doubt in the pleader's mind as to what the evidence will disclose. At least, he should be allowed to state them in the alternative, stating also the reason for so doing. There is the same reason for allowing alternative statements of defenses as for allowing alternative statements of the right of action. Michigan, by its new Court Rules following the JUDICATURE ACT OF 1915, has fully abandoned the rule of consistency and allows inconsistent counts and defenses to be freely pleaded and presented to the jury. (Rule 21, § 7.) New Jersey, in its recent PRACTICE ACT, has done the same thing. (Laws, 1912, Chap. 231, § 24.) It is to be hoped that the recent Minnesota rule will have many followers, who will frankly allow inconsistent defenses instead of going to doubtful extremes in trying to adhere to the old rule by calling inconsistent defenses consistent. H. G. C.

ORAL CONTRACT TO MAKE A DEVISE OR CONVEYANCE OF LAND.—Damages can never be recovered at law for breach of a contract which does not comply with the Statute of Frauds. On the other hand, if suit is brought in equity for specific performance, such relief will be granted under some circumstances. In a recent case, the plaintiff, the niece of the deceased, was treated by him as a member of the family. During girlhood and even after marriage, she performed many services of a personal nature for the deceased and wife. In compensation for these services, the deceased orally promised to will all of his property to the plaintiff. The deceased however made no will. Upon his death, the plaintiff brought an action against the administrator for specific performance of the oral contract. *Held*, that this relief should be granted. *Rine* v. *Rine* (Neb. 1916), 158 N. W. 941. In another recent case, the facts of which were precisely similar, the New Jersey court refused to decree specific performance. *Boulanger* v. *Churchill* (N. J. 1916), 97 Atl. 947. These two contrary decisions offer an opportunity for an inquiry into the theory or theories upon which equity, under some circumstances, gives effect to an oral contract to convey or devise lands in spite of the Statute of Frauds.

Most courts hold that the Statute of Frauds applies to oral contracts to devise lands as well as to oral contracts to convey lands. *Judy* v. *Gilbert,* 77 Ind. 96, 40 Am. Rep. 289; *Berge* v. *Hiatt's Adm.,* 82 Ky. 666; *contra, semble, Soper* v. *Galloway,* 129 Ia. 145, 105 N. W. 399. An early case, decided nine years after the enactment of the Statute of Frauds, held that, in an action for specific performance, the taking of possession by the vendee was a sufficient act of part performance to take the agreement out of the operation of the statute. *Butcher* v. *Stapely,* 1 Vernon 363 (1685). But there has since grown up a grave conflict as to what particular acts of part performance are necessary. It is well settled in England and in the great majority of American jurisdictions that the payment of purchase money, in full or in part, is not sufficient. *Britain* v. *Rossiter,* 11 Q. B. Div. 123, 131; *Cooper* v. *Colson,* 66 N. J. Eq. 328, 58 Atl. 337; *Bake* v. *Wiswell,* 17 Neb. 52. The contrary view has been taken in Delaware, probably in Georgia and by statute in Iowa. *Houston* v. *Townshend,* 1 Del. Ch. 416, 12 Am. Dec. 109; *Rawlins* v. *Shropshire,* 45 Ga. 182; IOWA CODE, § 4626. The majority view is no doubt the better, for the payment of money is an equivocal act, *i. e.,* it does not necessarily refer to a contract for the sale of the particular land; and the rule also works no great injury as the vendee can recover the purchase price in an action at law. *Hull* v. *Thomas,* 82 Conn. 647; *Mills* v. *Joiner,* 20 Fla. 479.

The English view and that of some of the American courts is that possession taken by vendee in pursuance of an oral contract will take the case out of the statute. *Clinan* v. *Cook,* 1 Sch. & Lef. 22, 40; *Wharton* v. *Stoutenburgh,* 35 N. J. Eq. 266; *Pugh* v. *Good,* 3 W. & S. (Pa.) 56, 37 Am. Dec. 534. There are many dicta following the English view but in most of the cases there were other acts of part performance in addition to taking possession by the vendee. The courts of Massachusetts, Texas, and Kansas insist that possession by the vendee must be accomplished by such circumstances as would lead to irreparable injury in case the relief is denied. *Burns* v. *Daggett,* 141 Mass. 368; *Weatherford Co.* v. *Wood,* 88 Tex. 191; *Baldridge* v. *Centgraf,* 82 Kans. 240. In the following cases, substantial payments or improvements were required in addition to possession by the vendee. *Dunckel* v. *Dunckel,* 141 N. Y. 427; *Derr* v. *Ackerman,* 182 Pa. 591; *Holmes* v. *Caden,* 57 Vt. 111. The following cases illustrate the rule in their respective states that possession must be accompanied by at least substantial payment (nothing said concerning improvements). *Wright* v. *Raftree,* 181 Ill. 464; *Nelson* v. *Shelby Co.,* 96 Ala. 515 (statutory); *Wallace* v. *Scoggins,* 17 Ore. 476. In Kentucky, Mississippi, North Carolina and Virginia (by statute, CODE § 2413), nothing except fraud will take the case out of the Statute of Frauds and the doctrine of part performance is thoroughly repudiated. The application of this rule may no doubt seem to work great hardship but it is the only rule in which the courts do not rewrite the Statute of Frauds.

In the principal cases however, possession by the plaintiff cannot take the case out of the statute for it is part of the agreement that the devisor is to remain in possession and any possession taken by the plaintiff would not be

exclusive. The cases in which possession by the plaintiff is impossible must be considered separately and, as the principal cases suggest, there is a conflict of authority in the decisions. Even where the consideration on the part of the plaintiff consists of past services of a very personal nature and he has given up his home or business in order to render them, there is a grave conflict. The following cases are in accord with the principal Nebraska case: *Lloyd* v. *Hollenbeck,* 98 Mich. 203; *Best* v. *Gralapp,* 69 Neb. 811 (not cited in principal case); *Pflugar* v. *Pultz,* 43 N. J. Eq. 440 (see valuable note). On the other hand, the following cases take a contrary view: *Grant* v. *Grant,* 63 Conn. 530; *Wallace* v. *Long,* 105 Ind. 522; *Baldwin* v. *Squier,* 31 Kans. 283; *Orabill* v. *Marsh,* 38 Oh. St. 331. It is interesting to notice that without a review of the authorities, the court in the principal New Jersey case decides contrary to a line of at least five decisions in its own state. Under the circumstances of an admitted conflict, it is well to inquire into the theory upon which equity will decree specific performance of oral contracts required to be in writing by the Statute of Frauds. By granting relief equity is clearly rewriting the Statute of Frauds, and there must be some theory upon which it proceeds to do so. Furthermore, it would seem that if equity does this on one ground in cases in which possession is possible it ought logically to be on the same ground in cases in which it is not possible for the plaintiff to take possession. There are at least two distinct theories suggested by the cases. The first is that equity will seek a substitute for the writing required by the statute, *i. e.,* such acts of part performance as are referable to a contract concerning this particular land. This is no doubt the theory underlying the English, the New York and the Illinois groups of cases, *supra.* The second theory is the one suggested by the principal Nebraska case, that equity will decree specific performance where otherwise the injury to the plaintiff would be, in fact, irreparable. The Massachusetts doctrine is perhaps a combination of both theories but no court adopts the theory of irreparable injury alone, where possession is possible.

It would seem then that in cases in which possession is impossible, the courts should refuse to grant specific performance unless there are other acts which are referable only to a contract for the land in question. It cannot be said that the services performed in the principal cases are referable only to a contract for a devise of the particular lands. Hence, if the New Jersey court in the principal case proceeded on the theory of part performance referable to the contract, it was right in denying relief. But in the principal Nebraska case, the court shifted over to the theory of irreparable injury in cases in which possession is impossible. This seems illogical, but justice is no doubt obtained in this manner. There are at least two variations or combinations of these theories. In the leading English case of *Maddison* v. *Alderson,* L. R. 8 App. Cases 467, Lord SELBORNE insists that there must be such acts of part performance as are clearly referable only to a contract concerning this particular land. If this is shown, then he will consider whether more substantial justice would be accomplished by granting specific performance than by refusing it. This is in reality a combination

of both views. On the other hand, Lord BLACKBURN recognized that it is settled law that a change of possession will take a case out of the Statute of Frauds, but he regards this as an anomaly and refuses to extend it to cases in which there is no change of possession. This is a limitation of the first theory.

When the plaintiff has rendered ordinary personal or professional services, the value of which can be readily estimated, his injury is not irreparable, and specific performance should be denied under any of these theories. Where the services are very personal, however, such as the care of an aged person, especially when it necessitates an abandonment by the plaintiff of his business or his home, it is no doubt just to grant specific performance. As POMEROY says: "There are things which money cannot buy; a thousand nameless and delicate services and attentions incapable of being the subject of explicit contract, which money with all its peculiar potency, is powerless to purchase." T. E. A.

WHAT CONSTITUTES INTERSTATE COMMERCE UNDER THE FEDERAL EMPLOYERS LIABILITY ACT OF 1908?—The material provisions of the act are "That every common carrier by railroad while engaged in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death, resulting in whole or in part from the negligence of any of the officials, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines * * *" COMPILED STATUTES 1913, §§ 8657-8665. As stated in the case of *Pederson* v. *Delaware, L. & W. R. Co.*, 197 Fed. 537, 117 C. C. A. 33, "the object of this act was to broaden the right to relief for damages suffered by railroad employees in interstate transportation." This act, unlike the one condemned in *Employer's Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, deals only with the liability of a carrier engaged in interstate commerce (*Mondou* v. *New York, N. H. & Hartford Co.*, 223 U. S. 1, 38 L. R. A. N. S. 44, 32 Sup. Ct. 169, 56 L. ed. 327), the old one being condemned because of its being an attempt to regulate liability for injuries not only from interstate traffic, but also from intrastate traffic. And to recover, plaintiff must not only be employed by such interstate carrier, but must himself have a real and substantial connection with the interstate commerce in which the carriers and their employees are engaged; it is on this question—the relation of the plaintiff himself to such interstate commerce—that most of the cases turn in the interpretation of the statue. *Pedersen* v. *Delaware &c. Co., supra.* The court must find that he himself was at the time of the injury engaged in interstate commerce. *Lucchetti* v. *Philadelphia & R. Ry. Co.*, 233 Fed. 137.

An engineer hauling cars engaged in both interstate and intrastate commerce was held by the North Carolina Supreme Court to have been engaged in interstate commerce in *Horton* v. *Seaboard Air Line Ry.*, 157 N. C. 146, 72 S. E. 958. And it is settled that if one is engaged at the time in inter-